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No. 89-608

In The

Supreme Court of the United States

October Term, 1989

DR. LEE ROY BLACK, et al.,

Petitioners,

vs.

JOHN BOLIN, et al.,

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

Respondents make the following additions and corrections to Petitioners' Statement of the Case.

Contrary to Petitioners' contention, this litigation did not arise from injuries received by Respondents as a result of excessive force used to quell a prison riot. "In the instant case, the beatings complained of by the prisoners occurred *after* any threat to institutional security had been quelled." *Bolin v. Black*, 875 F.2d 1343, 1350 (8th Cir. 1989).

Following the deadlocking of all inmates in their cells, corrections officials removed certain inmates from their cells and took them to the housing unit rotunda. All of the events which formed the basis for this litigation took place after the Plaintiffs were removed individually from their cell by two or more corrections officials. No inmate offered any resistance to the corrections officials at any time following their removal from their cell.

No claim rests upon any action taken by any Defendant in restoring order during the disturbance which had taken place earlier that evening prior to the deadlocking of all inmates in their cells.

As to the injuries inflicted upon the Respondents, Bolin testified that he was kicked hard when taken from his cell. He was badly beaten, the pain from the blows he received lasted several days and he had a headache for a good two days.

McWorthy testified the blows he endured in Housing Unit 2 were forceful blows meant to cause pain and they did, one of the blows dislocated his jaw and cracked some

of his teeth. The guards on the bus were putting their weight into their punches; the pain from their blows brought tears to his eyes. He was bruised and sore up and down his back and on his shoulders and legs from being beaten.

Wilson testified he was hit with hard blows which were intended to cause pain and which caused pain through his whole body; the blows caused him to cry out and brought tears to his eyes. The blows and pain he sustained caused him to have a bowel movement while in the rotunda. The blows he received in the bus "hurt real bad".

REASON FOR DENYING THE WRIT

A. The Eighth Circuit Court of Appeals adopted a correct Eighth Amendment Analysis of Petitioners' liability arising from the use of force in a situation not involving the preservation of internal order and discipline nor taken to maintain institutional security.

Petitioners' arguments are not with the application of the law to agreed upon facts but are based upon Petitioners' rejection of the facts found by the jury, the trial judge and the Eighth Circuit Court of Appeals. In each instance the conclusion the deliberating body reached was that the beatings complained of in this case took place "after prison officials had restored order to the facility" and "after any threat to institutional security had been quelled". *Bolin v. Black*, 875 F.2d 1343, 1346 (8th Cir. 1989).

Petitioners continue to erroneously maintain that the facts in the instant case compare with the facts existent in *Whitley v. Albers*, 475 U.S. 312 (1986). Albers was shot by a corrections officer while prison officials were attempting to retake control of the cell block, a guard was still held hostage, numerous inmates were outside their cells and one inmate was armed with a knife. *Id.* at 322-3.

In this case, after all inmates were locked down in their cells, Respondents were removed from their cells, handcuffed and then beaten and abused. An entirely different factual situation from that addressed by this Court in *Whitley*.

An Eighth Amendment claimant is required to "prove the unnecessary and wanton infliction of pain" to establish the imposition of cruel and unusual punishment. *Ingraham v. Wright*, 430 U.S. 651, 670 (1977); *Whitley* at 319; *Graham v. Conner*, 109 S.Ct. 1865, 1873, n.11. (1989). Only when the force complained of is applied as a prison security measure to resolve a disturbance must the claimant show that the force was applied maliciously and sadistically and not in a good faith effort to maintain or restore order. *Whitley* at 1085.

In this case, as the force complained of was neither applied to resolve a disturbance nor as a prison security measure, the *Whitley* standard is inapplicable.

Petitioners point to the decision of the Eight Circuit Court of Appeals in *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) to demonstrate "confusion in the courts" in applying the *Whitley* standard. Petitioners compare the facts of *Cowans* ("[An] inmate locked in his cell creates a security disturbance by refusing to close his food service

slot.", Petitioners Brief P. 10) with the facts in *Bolin* ("[S]ecurity measures enacted to quell a full scale prison environment in which one officer was killed and several injured does not give rise to a security disturbance." *Id.* at 11). Once again Petitioners ignore or alter the facts of the case so as to advance this argument. The Eighth Circuit Court of Appeals specifically addressed the question of the applicability of the *Whitley* standard and the Eighth Circuit's decision in *Cowans* and found the present case to be outside the purview of both *Whitley* and *Cowans* because the beatings complained of in this case "occurred *after* any threat to institutional security had been quelled". *Bolin* at 1350.

The present case is neither a situation requiring immediate corrective action nor one involving the resistance by an inmate of the orders given to him. Confusion does not exist in the application of the *Whitley* standard by the Eighth Circuit Court of Appeals in cases involving Eighth Amendment claimants.

B. *Whitley v. Albers* did not alter the "deliberate indifference" standard in Eighth Amendment claims not involving institutional security.

This Court in its opinion in *Whitley* reaffirmed the "deliberate indifference" standard in Eighth Amendment cases when it quoted approvingly from *Ingraham v. Wright*, 430 U.S. 651 (1977) that after incarceration only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment. *Whitley*, at 319.

This Court did find the "deliberate indifference" standard to be inappropriate in those cases in which the

force complained of was undertaken to restore order or to resolve a disturbance. *Whitley* at 320-1. As set out in the Statement of Case and the lower court's decision such was not the situation in this case. *Bolin* at 1346.

There is no need now for this Court to undertake any further clarification of this field of law through a review of this case.

C. The *Bolin* jury was properly instructed as Eighth Amendment liability rests upon the infliction of pain while the award of compensatory damages rests upon the proof of damages by the Claimant.

Cruel and unusual punishment in violation of the Eighth Amendment is grounded upon the unnecessary and wanton infliction of pain, *Ingraham* at 670; *Whitley*, at 319; *Graham v. Conner*, 109 S.Ct. at 1873, n.11.

Petitioners' allegation that the jury award in the instant case was allowed "to stand despite the fact that the jury was not required to consider the extent of injuries suffered by Plaintiffs" is without basis in fact.

The jury in the instant case considered the nature and extent of the injuries sustained by the Claimants on two distinct occasions. First the extent of the injuries each Claimant sustained was considered by the jury in its application of Instruction No. 11. To find that the claimant had been subjected to cruel and unusual punishment in violation of the Eighth Amendment, the jury was required to find the claimant had suffered "Pain" as described and defined in Instruction No. 11. That instruction made it abundantly clear that minimal discomfort or

injury was not sufficient to give rise to a constitutional violation. The jury determined that a constitutional violation had occurred. In responding to the Petitioners' Motion for Judgment notwithstanding the verdict, the trial court stated that this finding was supported by the evidence. Petitioners' Appendix P. 51. Petitioners did not raise the question of the sufficiency of the evidence to sustain the findings of Eighth Amendment violations on appeal. *Bolin* at 1346-7.

Once the jury had found that claimants had sustained pain or injury of sufficient severity to constitute an Eighth Amendment violation, the jury then had to determine the amount of any damages to be awarded to Claimants. Instruction No. 44 provided the methodology the jury was to follow in making this determination. (Appendix 1). Petitioners never objected to this instruction, nor do they contend it is erroneous. *Bolin* at 1350.

In applying Instruction No. 44 the jury returned compensatory damages in amounts ranging from $1,000 to $5,000. These awards clearly demonstrate the jury's careful appraisal and evaluation of each claimants injuries.

Petitioners express concern that every common law battery will become the subject of constitutional litigation. Petitioners cite six cases in which Circuit Courts of Appeal affirmed a decision against an Eighth Amendment claimant because the injury claimed was not of constitutional severity in that the Claimants did not suffer "unnecessary and wanton infliction of pain". Each of the cases cited by Petitioners is in consonance with the law enunciated by this Court relating to Eighth Amendment claims; in each instance the lower court found the

alleged injury was not of constitutional magnitude. Nor are any of these cases at variance with the instant case; here the lower court and appellate court concurred with the jury that the injuries inflicted were of constitutional magnitude.

CONCLUSION

The legal principles relating to Eighth Amendment claims will not be clarified by the Court's grant of Certiorari in this case nor does any conflict or confusion in the decisions of the Circuit Courts of Appeal exist which could be resolved by the Court's consideration of this case. Respondents respectfully request the Court deny the application for Writ of Certiorari.

Respectfully submitted,

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INSTRUCTION No. 44

If you find the issues in favor of plaintiff then you must award plaintiff such sum as you believe will fairly and justly compensate him for any damages you believe he sustained as a direct result of the conduct of that defendant against whom you find the issues presented.

Damages must be reasonable. You are not permitted to speculate on the amount of damages. Further, if you find the issues in favor of a plaintiff on more than one of the claims, you may not award that plaintiff compensation for any item of damage more than once.